No. 23

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

CHARLES RICHARDSON, - - - *Plaintiff in Error,*

versus

H. V. McCHESNEY, Secretary of State of the Commonwealth of Kentucky, et al., - *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 456.

CHARLES RICHARDSON, - - - *Plaintiff in Error,*

versus

H. V. MCCHESNEY, SECRETARY OF STATE OF THE COMMONWEALTH OF KENTUCKY, ET AL., - - - - - - - - *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

May it please the Court:

On the 7th of January, 1907, the plaintiff in error brought this suit in equity in the Circuit Court of Green County, Kentucky, against the Secretary of State of Kentucky and the clerks of the county courts of the counties of Green, Hart and Taylor to enjoin the Secretary of State and his successor in office from certifying and the clerks from printing on the ballots the names

of the congressional nominees of the various political parties in accordance with the Congressional Apportionment Act of the Kentucky General Assembly, approved May 26, 1890, and the two acts amendatory thereof, approved respectively March 11 and 12, 1898, and to declare those acts unconstitutional and void under the Constitution of the United States and the Constitution of Kentucky, and void as repugnant to the acts of Congress which require the election of Congressmen to be by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants, and as repugnant also the subsequent act of Congress requiring such elections to be by districts composed of contiguous *and compact* territory and containing as nearly as possible an equal number of inhabitants.

The petition in equity (Record, pp. 1-9) sets forth that plaintiff is a citizen, elector, voter and taxpayer of the county of Hart and State of Kentucky, born in the United States and subject to the jurisdiction thereof, a citizen of the United States over twenty-four years old, and for more than two years and still a resident and citizen of Hart County, Kentucky, having all the qualifications requisite for electors of the most numerous branch of the State Legislature of Kentucky, and qualified and entitled to vote for member of the Kentucky House of Representatives from the representative district in which Hart County is situated, and for member of Congress from the congressional district in which that county is situated (R. p. 1); that his right to vote in such congressional election is a privilege belonging to

him as a citizen of the United States and guaranteed to him by the United States and Kentucky Constitutions. The petition pleads the acts of Congress of February 25, 1882, and February 7, 1891, making apportionment of representatives in Congress among the several States under the tenth and eleventh censuses, respectively, and each requiring the number of representatives in Congress to which each State may be entitled (Kentucky being entitled to eleven) to be elected by districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants, and also the Act of January 16, 1901, under the twelfth census, containing the same provision and requiring also that such districts should be composed of contiguous *and compact* territory (R. p. 2). It pleads the Kentucky Act of April 15, 1882, apportioning the State into eleven congressional districts (R. p. 3), and alleges the succeeding Kentucky Act of May 26, 1890 (the principal act attacked), and the two amendatory acts of March, 1898, which are also attacked, transferring certain counties from and to certain of the congressional districts (R. pp. 3, 4) and states the population of Kentucky, the average population of the congressional districts and the population of each in fact and according to the United States census taken in 1880, in 1890 and in 1900 (R. pp. 4-6). It alleges that the State of Kentucky can be divided into eleven congressional districts of contiguous *and compact* territory, and each approximately and reasonably equal in the number of inhabitants thereof, and that the three acts attacked are in violation of the pro-

vision of the Federal Constitution, guaranteeing to every State a republican form of government, in violation of various provisions of the Kentucky Constitution, and in violation of and repugnant to the acts of Congress above referred to, and that the congressional districts created by those acts of the Kentucky General Assembly do not contain as nearly as practicable an equal number of inhabitants, but utterly ignore the principle of equality (R. p. 6).

A table is given showing the excess and deficit in population of each district created by those acts according to the census of 1890 and that of 1900 (R. p. 6) and, from the facts stated, a table can be readily constructed according to the census of 1880 showing like discrepancies. The table given shows that according to the census of 1890 and, in fact, the populations of the congressional districts, created by the acts attacked vary from an extreme deficit below the average of..... 34,456
to an extreme excess above the average of..... 44,314
that is, a total difference of population in the extreme case of..... 78,770
with an average population per congressional district of 168,966
that is to say, that a voter in the eighth, the smallest district in population under the census of 1890, counted for more than one and one-half times as much as one in the eleventh district. According to the census of 1900, the extreme deficit was..... 51,989
and the extreme excess..... 62,484
that is, a total difference in the extreme case of..114,493

with an average population of.....195,197
so that a voter in the eighth district availed in voting more than one and four-fifths times as much as a voter in the eleventh. The figures given in the petition from the census of 1880 show the smallest district, the tenth, to have had a population of.....114,024
and the largest, the fourth, to have had a population of 188,124
a difference of..... 74,100
in population, so that a voter in the tenth district exercised more than one and three-fifths times as much power as a voter in the fourth. A discrepancy almost as great is shown between the eighth district with.....128,656
population or the seventh district with.....130,003
and the eleventh with.....172,630

Before the passage of the Kentucky Apportionment Act of May 26, 1890, the counties of Green, Hart and Taylor were in the eleventh district. By that act they were placed in the fourth district. By the Act of March 12, 1898, the counties of Cumberland and Monroe were taken from the third district and added to the already top-heavy eleventh, and the little county of Metcalfe was taken from the eleventh and added to the third. By the Act of March 11, 1898, the county of Jackson was taken from the eighth district, already far below the average, and added to the eleventh, already far above it (R. p. 6). The petition continues with apt averments as to the official action to be taken by the Secretary of State and his successor in office, and by the various clerks of the three counties named, unless restrained by injunc-

tion, namely, that they would proceed to certify and print the names of the candidates upon the ballots to be used in the various counties and districts in accordance with the invalid Apportionment Act of May 26, 1890, and the two acts amendatory thereof, and concludes with the prayer for injunctive relief and for all general and proper relief.

A demurrer was filed to the petition in equity. The trial court sustained the demurrer. The plaintiff in error declined to plead further and the petition was dismissed (R. p. 11). In deciding the demurrer the trial court stated from the bench that the division of the State into districts was grossly unfair, but that Congress had no power to restrict the States as to the allottment or mode of selecting Congressmen, but that matter was entirely with the State. An appeal was taken to the Court of Appeals of Kentucky and the judgment affirmed, the court delivering an opinion (R. pp. 13-16). That court based its decision in favor of the validity of the act attacked upon the proposition that the State Constitution contained no provision upon the subject; that the Federal Constitution left matters relating to the districts to the decision of the States, and questioned, though it did not decide upon, the power of Congress to control the States in the matter. An assignment of errors was filed (R. pp. 16-19) and writ of error sued out from this court (R. pp. 20, 21).

ARGUMENT.

I.

THE FEDERAL QUESTION AND THE DUTY OF THE STATE COURTS.

> "A final judgment or decree in any suit in the highest court of any State, in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of * * * any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity, or where any title, right, privilege or immunity is claimed under the Constiution, * * * or any * * * statute of * * * the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, * * * statute, * * * or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error." R. S. 700, as amended Feb. 18, 1875, 18 Stat. 318.

The Court of Appeals of Kentucky is the Supreme Court of Kentucky. (Ky. Constitution, Section 109.) The validity of the Kentucky statute of May 26, 1890, was distinctly drawn in question on the ground that it is repugnant to the Constitution of the United States, guaranteeing to each State a republican form of government, and on the ground that it is repugnant to the law of the United States which requires members of Congress to be elected by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants, and the decision of that

court was in favor of the validity of the statute. The right and privilege to vote for members of Congress in a district containing as nearly as practicable an equal number of inhabitants with that of the several districts of the State was specially set up and claimed by plaintiff in error, and the decision of the highest court of the State was against that right and privilege. The judgment rendered could not have been given without deciding in favor of the validity of the Kentucky statute and against the right and privilege claimed by plaintiff in error.

> "Where the Federal question is distinctly set up in the bill and insisted on at every stage, and the State court could not have decided as it did without overruling the claim, this court has jurisdiction." Otis Co. v. Ludlow Co., 201 U. S. 140.

The Court of Appeals seems to have misconceived the extent of its powers and duties.

The State court decided the demurrer in the absence of counsel for plaintiff in error. As we are informed, it stated, when the decision was rendered, that the apportionment was grossly unfair, but that Congress had no power to restrict the States as to the allotment or mode of selecting Congressmen, and that matter was entirely with the State.

The Court of Appeals in its opinion begins by stating that the census of 1890 had not been completed when the State Act of 1890 was passed, and that act was passed under the census of 1880, and copies from the petition the statement of the population of the various congres-

sional districts created by the Act of 1890, according to the census of 1880, in order to show that the division attempted by that act is not "grossly unequal." But the statement of the population of the districts copied in the opinion shows that the largest district had 188,124 and the smallest 114,024, a difference of 74,100, or a proportion of one to more than one and three-fifths. According to the census of 1890, the proportion was one to more than one and one-half, and by that of 1900, one to more than one and four-fifths.

But, the court continued:

> "This question is not material in the disposition of the case, as we are of the opinion that it is not within the power of the courts to control the legislative department in the creation of congressional districts. There is no mention of congressional districts in the Constitution of the State; nor is there in that instrument any direction to the General Assembly as to how the districts shall be laid off. In the matter of dividing the State into congressional districts the Legislature, at least so far as the power and authority of this court extends is supreme. This court has no control over its action. It would be exceeding the power granted us to undertake to revise or annul a legislative act relating to a subject over which the Legislature has absolute control. *Except when limited by the Constitution of the State,* the General Assembly especially in administrative and political affairs is beyond the reach of the judiciary of the State. We have no authority to pass judgment upon its acts. In no case that has come under our notice have the courts undertaken to attempt to restrain the legislative departments, *unless it violated some provision of the organic law of the State.* * * * But in the matter of congressional

districts, we find nothing in our State Constitution to guide us. There is nowhere any limitation upon the power of the Legislature, and it would be assuming authority this court does not possess if we undertook to control a co-ordinate department of the government in the performance of a power vested exclusively in it. It is not for the judiciary to question the policy, expediency or propriety of laws enacted by the General Assembly, unless they conflict with the Constitution."

This means, and in fact says, that the courts of the State have no power to declare a legislative act invalid unless it be forbidden by the *State* Constitution, and that those courts can not hold an act invalid as repugnant to the Federal Constitution or to the laws passed in pursuance thereto. As to this, it may be said that the Federal Constitution is at variance with this opinion of the Court of Appeals. It provides "that this Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or the laws of any State to the contrary notwithstanding." Constitution, Art. VI. The Court of Appeals was at variance with this opinion when, in Blair v. Williams, 4 Litt. 34, and in Lapsley v. Brashears, 4 Litt. 47, it held the State law of Kentucky invalid under the Federal Constitution as impairing the obligation of contracts, and those decisions were rendered at a time when it was openly threatened that the court would be legislated out of office in the event of such a decision, when the attempt was actually made, because of this decision, to so legislate, and

when the State forgot all party ties and divided into "old and new court parties," striving for supremacy with a bitterness and ferocity not equaled even during the strife of the Civil War.

That court in Griswold v. Hapburn, 2 Duv. 20, held an act of Congress void as in violation of the Federal Constitution, and its decision was at first affirmed by this court, but afterwards decided the other way.

Now, it is immaterial, so far as this court's power of review is concerned, whether the Court of Appeals held that the act assailed was not repugnant to the Federal Constitution or the acts of Congress, or whether it held that it had no power to decide the question, or whether it held, as it intimates, that Congress had no power to legislate as to the manner in which representatives in Congress should be chosen by districts. Whichever theory was the basis of the court's opinion, it was equally a decision in favor of the validity of the law, and against the right and privilege specially set up and claimed by plaintiff in error.

In Dale v. Hyatt, 125 U. S. 46, this court held, in an opinion by Mr. Justice Gray, that the judgment of the State court holding that the question of the validity of the re-issue of a patent could not be contested in the action before it, and assuming jurisdiction to render judgment against the defendant, "necessarily involved a decision against the immunity claimed by the defendant under the Constitution and laws of the United States, which this court has jurisdiction to review."

But the Court of Appeals was in error as to its power and duty when it said that, except when limited by the Constitution *of the State*, the General Assembly was beyond the reach of the judiciary of the State. This court has determined this question in Claflin v. Houseman, 93 U. S. 130, where Mr. Justice Bradley said:

> "The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws."

In Cooley's Principles of Constitutional Law, pp. 32, 33, it is said:

> "A State law must yield to the supreme law, whether expressed in the Constitution of the United States or in any of its laws or treaties, so far as they come in collision, and whether it be a law in existence when the 'supreme law' was adopted or enacted afterwards. The same is true of any provision in the Constitution of any State which is found to be repugnant to the Constitution of the Union. And not only must 'the judges in every State' be bound by such supreme law, but so must the State itself, and every official in all its departments and every citizen."

In Robb v. Connelly, 111 U. S. 637, Mr. Justice Harlan said:

> "A State court of original jurisdiction, having the parties before it, may, consistently with existing Federal legislation, determine cases at law or in equity arising under the Constitution and laws of the United States or involving rights dependent upon such Constitution or laws."

And again in the same opinion:

> "Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States *and the laws made in pursuance thereof* wherever those rights are involved in any suit or proceeding before them, for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the constitution or laws of any State to the contrary notwithstanding.' If they fail therein, and withhold or deny rights or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination."

See also:

Teal v. Fulton, 53 U. S. 292.
The Moses Taylor, 4 Wall. 428.
Martin v. Hunter, 1 Wheat. 334.
Ex parte McNeil, 13 Wall. 236.
Murray v. Chicago & N. W. R'y Co., 62 Fed. 24.
Ex parte Siebold, 100 U. S. 371.

The Constitution provides that the times, places and manner of holding elections for representatives shall be prescribed in each State by the Legislature thereof, but the Congress may at any time make or alter such regulations. The Congress has acted upon this question, under this power, and has made regulations as to the places and manner of holding elections for representatives by

stating that they shall be elected by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants. Nevertheless the Court of Appeals questions the right of Congress to thus determine the places and manner of holding congressional elections and passes the question up to this court in these words:

> "What right, if any, Congress has to control or supervise the action of State legislatures in the division of the States into congressional districts, we need express no opinion, in the absence of a judicial determination by the Supreme Court of the United States of the power of Congress to control the States in this matter."

II.

THE KENTUCKY ACT IS REPUGNANT TO THE FEDERAL CONSTITUTION AND THE ACT OF CONGRESS.

The Kentucky act is repugnant to the Federal Constitution.

> "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, * * *." Constitution, Art. 1, Sec. 2, Clause 3.
>
> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, including Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-president of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or members of the Legis-

lature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." Fourteenth Amendment, Sec. 2.

These provisions necessarily imply equality. They guarantee the right and privilege of equality in representation.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. * * *" Fourteenth Amendment, Section 1.
>
> "The Congress shall have power * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers fixed by this Constitution for the Government of the United States or in any department or officer thereof." Constitution, Art. 1, Sec. 7, Clause 18.
>
> "The times, places and manner of holding elections for senators and representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

The Congress, therefore, had power by legislation to require the equality implied by the Constitution and had express power under the grant last quoted to make regulations or alter regulations made by a State Legislature as to the times, places and manner of holding elections for

representatives. Under this grant Congress has exercised the power to make regulations as to the places and manner of holding elections for representatives by requiring in the acts specially pleaded in the petition in this case that the election shall be by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants and by the act also pleaded of January 16, 1901, requiring such districts to be composed "of contiguous and compact territory."

The Federal law is supreme.

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Const., Art. VI.

See *ex parte* Siebold, 100 U. S. p. 386.

Wesberry v. Sanders, 376 U.S. 1, 17 (1964)

By the Federal Statutes passed prior to the act assailed the districts were required to be composed of contiguous territory and to contain as nearly as practicable an equal number of inhabitants. By the Federal act passed afterwards the districts were required to be composed of compact territory in addition to the requirements before made. If the State act was not in conformity with the subsequent Federal act, it was invalidated by the passage of the later act. This, however, is immaterial, as the State act was clearly repugnant to the prior Federal acts.

The State Act of 1890 did not provide districts "containing as nearly as practicable an equal number of inhabitants." This is clearly shown by the statement in this brief. The facts are admitted by the demurrer. The districts created by the State act do not contain as nearly as practicable an equal number of inhabitants whether tested by the census of 1880, 1890 or 1900. By the census of 1880, taken ten years before the passage of the act assailed, there were more than one and three-fifths times as many voters in the fourth district as in the tenth. There was nearly as much difference between the eighth and the eleventh and between the seventh and the eleventh. By the census of 1890, taken the same year the act was passed, there were more than one and one-half times as many voters in the eleventh as in the eighth and other discrepancies almost as bad. By the amendatory Act of March 12, 1898, two counties were added to the eleventh and one was taken away, making a net addition of ten thousand population to the largest district according to the census of 1890. By the Act of March 11, 1898, another county of over eight thousand population was added to the eleventh, the largest district. And these additions were made eight years after the census of 1890, and are not referred to in the opinion.

A disproportion of more than three to two might be tolerable and tolerated in State representative or senatorial districts where the State Constitution forbade the division of a county. There might be some excuse for such a disproportion where it resulted from a desire to avoid the dismemberment of a single very populous

county in a State, but we submit it is not to be tolerated where, as in this case, the disproportion might be easily avoided without crossing county lines by simply moving some of the small counties from a district which was too large to an adjoining district which was too small. It is not just that two men in one district should have more than the voting power of three men in an adjoining district of the same State.

It is not denied that the State of Kentucky as at present divided into counties is susceptible of division into eleven congressional districts, each of which would be composed of contiguous and compact territory, and each of which would contain a reasonably and approximately equal number of inhabitants, and this could be done without dividing any county, except in one instance in which the county of Jefferson, containing the city of Louisville, is the whole of one congressional district.

There are no authorities which we have been able to find upon the question of congressional apportionment. Cases of unequal division of representative and senatorial districts in the various States under constitutional provisions similar to the provisions of the Federal Statutes here invoked are numerous. The principle is practically the same, and is thus stated in Williams v. Secretary of State (Mich), 108 N. W. 749, decided July 24, 1906:

> "The State can not be divided into * * * districts with mathematical exactness, nor does the Constitution require it. It requires the exercise on the part of the Legislature of an honest and fair

> discretion in apportioning the districts so as to preserve as nearly as may be the equality of representation. This constitutional discretion was not exercised. * * * The facts themselves demonstrate this beyond controversy, and no language can make the demonstration plainer."

In Giddings v. Blacker, 93 Mich. 1, eight State senatorial districts had nearly double the population of eight other senatorial districts. The apportionment act was held invalid.

In the case of Parker v. State, 133 Ind. 178, eleven districts had about one and one-half times the population of eleven other districts. The act was held invalid.

In the Williams case, quoted *supra*, some of the legislative districts contained about double the population of others. The act was held invalid.

III.

THE JUDICIAL QUESTION.

The courts have jurisdiction to determine the validity of the Apportionment Act.

This has been decided on so frequently as to be unquestionable.

McPherson v. Blacker, 146 U. S. 1.
Ragland v. Anderson, 125 Ky. 141.
Purnell v. Mann, 105 Ky. 91.
People v. Thompson, 155 Ill. 460.
Parker v. State, 133 Ind. 178.
Denny v. State, 144 Ind. 543.
Williams v. State, 108 N. W. 749.

Giddings v. Blacker, 52 N. W. 944.
State v. Cunningham, 83 Wis. 90.
State v. Cunningham, 81 Wis. 440.
Sherrill v. O'Brien, 188 N. Y. 185.

And see Brooks, Clerk, v. State, 162 Ind. 568, which collates all the leading cases on this subject to the date of the opinion.

IV.

MOOT QUESTION.

We are well aware that by the ruling of this court it can not be required to determine a moot case wherein its judicial power can not be exercised and where its judgment would not be final and conclusive upon the rights of the parties. That question will very possibly be raised here, for the reason that this case was prepared with special reference to the congressional election in November, 1908, and in full confidence that a final decision would be reached by this court before the date of that election if the highest court of Kentucky should decide in favor of the validity of the act. With that object in view, this suit was filed January 7, 1907. It was argued and submitted in the trial court on March 27th. The trial court intimated from the bench at the argument what its decision would be, but did not decide the demurrer until June 27th. As promptly as possible the record was obtained and filed in the Court of Appeals on August 27th. It was submitted to the court on October 16, 1907. Not until March 11, 1908, was the judgment

of affirmance rendered, and it was then too late by any possibility to secure its determination by this court before the November election of 1908.

We should be uncandid if we did not avow that, because this case was prepared with special reference to that election, because the great majority of the averments relate to that election, and that election is now past, a casual examination of the record would lead to the conclusion that it was a moot case.

But we submit that the averments of the petition which was dismissed on demurrer present a case where the judgment of this court will be final and conclusive of the rights of the parties, which this court may and should decide upon existing facts and rights, where substantial relief can be granted effective for the preservation of the rights of the plaintiff in error and other citizens of Kentucky, and where the rights upon which a decision is asked are substantial rights to protect which relief should be granted.

The petition sets out in full detail the rights and qualifications of the plaintiff in error as a citizen, elector and voter in Hart County, Kentucky, the status of that county with respect to congressional elections, the status of the congressional districts before the passage of the act assailed, the status attempted to be created by that act, the Federal Statutes to which that act is repugnant and the manner and extent of its repugnancy. It sets out in full detail, also, the mode in which the defendant officials will, unless restrained by the court, certify and print upon the ballots the names of the nominated can-

didates for Congress of the various political parties. It does this last, it is true, with specific reference to the congressional election of November, 1908. For the reasons heretofore stated, it makes specific averments and seeks specific relief as to that election, but it avers also "and said defendant's, said H. V. McChesney's successor in office will continue to act in like manner as to nominees in Congress in the Commonwealth of Kentucky unless this court shall enjoin and restrain him therefrom" (R. p. 8).

The status averred is a continuing status so far as legislation is concerned. This court knows judicially that no new congressional apportionment act has been adopted in Kentucky, and knows also that the provisions in the Federal Statutes to which that act is repugnant are still in force. The status of the plaintiff in error as a citizen, elector and voter are presumed to be continuing. His rights are presumed still to exist and his rights and privileges as a citizen of the United States and the right of all other citizens of Kentucky are still invaded by this act which denies to him and them the right, and deprives him and them of the privilege given, by implication in the Constitution, and specifically by the acts of Congress, to an equal voice in the selection of the Congressmen who are to represent Kentucky in the Federal Congress.

The prayer of the petition also was drawn with specific reference to the election of 1908 and asks specific relief with respect to that election. But it does more. It continues "and plaintiff further prays that said defend-

ant McChesney and his successor in said office be enjoined and restrained from proceeding under or in accordance with said void and unconstitutional act, approved respectively May 26, 1890, March 12, 1898, and March 11, 1898, or from certifying to the various county court clerks of Kentucky the names of any nominees for said office of member of Congress according to said void and unconstitutional acts. * * * And plaintiff prays for all proper and general relief."

If, under such general averments, and such a general prayer, relief can not be granted by the court of last resort, then it follows that no relief can be given against any gerrymander, no matter how infamous, if the courts of the State, elective by the same majority which elects the Legislature, do not wish the relief granted, or are not willing that it should be. No imputation is designed upon the courts who have hitherto passed upon this case. It is assumed that the delay in this case was the result of motives entirely proper. The Court of Appeals of Kentucky in Ragland v. Anderson, *supra,* affirmed the judgment of two circuit courts granting relief against a most infamous gerrymander of the Kentucky Legislative districts, whereby a voter in one district was given more than seven times as much voting power as a voter in another district. As has been said, there is no intention to reflect upon the courts. But this court will observe from this case how easily a case may be delayed until the term of the particular officer sought to be enjoined expires, or until the next election is passed and gone, if the courts so desire.

The law is well settled in Kentucky and elsewhere that where relief is sought against a person in his official capacity to compel or restrain official action, the suit does not abate by reason of the death, resignation or expiration of the term of office of the incumbent officer, even when such fact is pleaded in the proceeding. "A change in the membership of the board does not so change the parties as to abate the proceedings. The constituent parts of the board may not be the same, but the representative body remains identical."

Maddox *et al.* v. Graham & Knox, 2 Metc. 71.
City of Louisville v. Kean, etc., 18 B. Mon. 13.

In Lindsay v. The Auditor of Kentucky, 3 Bush, 235, Judge Williams, delivering the opinion of the court, said:

> "So with the office of State Auditor; the individual holding the office at any given period may resign, or die, or remove from the State, but the office continues, and his successor's duty is to guard the interest of the State in all legal proceedings commenced by or against him."

These cases are cited merely to show the doctrine in Kentucky. Authorities might be multiplied from other States.

We ask a reversal of the judgment.

Respectfully,

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